CHAN KWAI FOONG v. DATO' CAPT MOHD NAJIB ABDULLAH

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1963-12-2015]
12 JANUARY 2017

LAND LAW: *Transfer – Fraud – Registered proprietor purchased property from developer and later lived overseas many years – Registered proprietor discovered that title of property had been transferred to another individual upon return to Malaysia – Whether second purchaser party or privy to fraud committed by developer – Whether second purchaser's title defeasible – Whether second purchaser was purchaser in good faith and for valuable consideration – National Land Code, s. 340(2)(a) & (3)*

LAND LAW: *Transfer – Fraud – Registered proprietor purchased property from developer and later lived overseas many years – Registered proprietor discovered that title of property had been transferred to another individual upon return to Malaysia – Registered proprietor commenced action against developer and directors for fraud – Developer and directors did not enter appearance – Judge ruled that fraud had been proved against developer and directors and findings to bind other defendants – Whether findings by judge correct*

The respondent ('the plaintiff') had purchased an apartment ('the property') from the developer ('the first defendant') in 1989. He then lived in South Korea for many years and only came back to Malaysia in 2012. Upon his return, the plaintiff discovered that (i) there had been an entry into the property by one Chan Kwai Foong ('the fourth defendant') as an alleged registered owner; (ii) the fourth defendant had executed a sale and purchase agreement with the first defendant and the title of property was then registered under the former's name; and (iii) the fourth defendant was in the process of selling the property to one Kenneth Tan ('the fifth defendant'). According to the plaintiff, he had never consented to having the property transferred to anyone. The plaintiff claimed against the first defendant and its directors ('the second and third defendants'), the fourth and fifth defendants and Pendaftar Hak Milik Tanah Wilayah Persekutuan Kuala Lumpur ('the sixth defendant') at the High Court on the ground of fraud. Since no appearance was entered by the first to third defendants, the Judicial Commissioner ('the JC') took the position that fraud had been proved against the first to third defendants and this finding would be binding on the other defendants. At the end of the trial, the JC made the finding that, *inter alia*, the fourth defendant was not a *bona fide* purchaser and for valuable consideration within the meaning of the proviso to s. 340(3) of the National Land Code and as a consequence, the title of the fourth defendant was

defeasible. Following these findings, the sixth defendant was directed to effect transfer of the said property to the plaintiff and to record the plaintiff as the registered proprietor. Hence, the present appeal by the fourth defendant only.

Held (dismissing appeal; affirming orders of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The claim against the first defendant was based on fraud as was the claim against the fourth defendant. The first to third defendants did not file any appearance and failed to turn up in court. The JC was then entitled to rule, as he did, that based on the finding of fraud taken to have been proved against the first to third defendants, this finding would also be binding on the other defendants in the action. (para 40)

(2) The burden of proving *bona fide* was on the fourth defendant. However, she did not turn up at the trial to give evidence and instead gave a power of attorney to her lawyer. The facts and circumstances relating to the sale were peculiarly within the knowledge of the fourth defendant. The failure of the fourth defendant to testify did not only discredit her case but strengthened the plaintiff's case. (paras 26 & 29)

(3) The first defendant, after receiving the purchase price and surrendering possession of the property to the plaintiff, became a bare trustee for the plaintiff. Accordingly, the first defendant had no legal capacity to enter into any agreement with the fourth defendant. The first defendant could not give a better title than what it had. The fourth defendant could not have obtained a good title from the first defendant. The subsequent sale and purchase agreement entered into between the first and fourth defendants was therefore void. It followed that all transactions relating to this sale, including the documents or instruments used, were all similarly void. The fourth defendant was disentitled to the property and the plaintiff must remain its rightful owner. (paras 37 & 40)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') telah membeli sebuah apartment ('hartanah') daripada pemaju ('defendan pertama') pada 1989. Dia kemudian menetap lama di Korea Selatan dan pulang semula ke Malaysia pada 2012. Sekembalinya, plaintif mendapati (i) berlaku kemasukan ke dalam hartanahnya oleh seorang bernama Chan Kwai Foong ('defendan keempat') yang kononnya pemilik berdaftar; (ii) defendan keempat telah memeterai satu perjanjian jual beli dengan defendan pertama dan hak milik hartanah tersebut seterusnya didaftar atas nama defendan keempat; dan (iii) defendan keempat dalam proses menjual hartanah tersebut kepada seorang bernama Kenneth Tan ('defendan kelima'). Menurut plaintif, dia tidak pernah memberi kebenaran agar hartanah tersebut dipindah milik kepada sesiapa pun. Plaintif memfailkan tuntutan terhadap defendan pertama dan pengarah-pengarahnya ('defendan kedua dan ketiga'), defendan keempat dan kelima dan Pendaftar Hak Milik

Tanah Wilayah Persekutuan Kuala Lumpur ('defendan keenam') di Mahkamah Tinggi atas dakwaan penipuan. Oleh kerana defendan pertama hingga ketiga tidak merekodkan kehadiran, Pesuruhjaya Kehakiman ('PK') berpendapat penipuan oleh defendan pertama hingga ketiga berjaya dibuktikan dan dapatan ini mengikat defendan-defendan lain. Pada penutup perbicaraan, PK memutuskan, antara lain, defendan keempat bukan pembeli suci hati dan bagi balasan bernilai dalam maksud proviso s. 340(3) Kanun Tanah Negara dan akibatnya, hak milik defendan boleh disangkal. Berikutan dapatan ini, defendan keenam diarah menguatkuasakan pindah milik hartanah kepada plaintif dan merekodkan plaintif sebagai pemilik berdaftar. Maka timbul rayuan ini oleh defendan keempat sahaja.

Diputuskan (menolak rayuan; mengesahkan perintah-perintah Mahkamah Tinggi)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan terhadap defendan pertama adalah berdasarkan penipuan seperti juga tuntutan terhadap defendan keempat. Defendan pertama hingga ketiga tidak memfailkan kehadiran dan gagal hadir ke mahkamah. Oleh itu, PK berhak memutuskan, seperti yang beliau putuskan, bahawa berdasarkan dapatan penipuan yang didapati berjaya dibuktikan terhadap defendan pertama hingga ketiga, dapatan ini juga mengikat defendan-defendan lain dalam tindakan ini.

(2) Beban membuktikan suci hati dipikul oleh defendan keempat. Walau bagaimanapun, dia tidak hadir ke mahkamah untuk memberi keterangan dan, sebaliknya, memberi surat kuasa wakil kepada peguamnya. Fakta dan hal keadaan berkaitan jualan hanya diketahui oleh defendan keempat. Kegagalan defendan keempat memberi keterangan bukan sahaja melemahkan kesnya bahkan memantapkan lagi kes plaintif.

(3) Selepas menerima harga belian dan menyerahkan milikan hartanah kepada plaintif, defendan pertama menjadi pemegang amanah bagi pihak plaintif. Oleh itu, defendan pertama tidak mempunyai kapasiti bawah undang-undang untuk memeterai apa-apa perjanjian dengan defendan keempat. Defendan pertama tidak boleh memberi hak milik yang lebih baik daripada yang dipegangnya. Defendan keempat tidak mungkin memperoleh hak milik sah daripada defendan pertama. Oleh itu, perjanjian jual beli terkemudian yang dimeterai antara defendan pertama dan keempat terbatal. Semua transaksi berkaitan jualan ini, termasuk dokumen atau instrumen terlibat, juga terbatal. Hak defendan keempat terhadap hartanah tersebut terlucut dan plaintif semestinya kekal sebagai pemilik sah.

Case(s) referred to:

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 8 CLJ 107 HC ***(refd)***

Samuel Naik Siang Ting & Ors v. Public Bank Bhd [2015] 6 CLJ 914 CA ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 340(2)(a), (3), 417

For the appellant - Justin Chin & Bani Prakash; M/s Bani Prakash & Co
For the respondent - Harjinder Singh Sandhu; M/s Akberdin & Co

[Editor's note: For the High Court judgment, please see Dato' Capt Mohd Najib Abdullah v. Natarjaya Sdn Bhd & Ors [2016] 1 CLJ 461 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

Introduction

[1] This appeal concerns the sale of property by the developer/owner to two different purchasers some 19 years apart. The main issue here is which of the two purchasers has a better claim to the property.

[2] The property concerned is held under Geran Strata 111459/M1/3/7 Lot No 375, Seksyen 99, No Petak 7, No Tingkat 3, No Bangunan M1, Bandar Kuala Lumpur Daerah Wilayah Persekutuan ("the property"). The subject property in question bears the postal address of No 307, Menara Seputeh, Jalan Klang Lama, 58000 Kuala Lumpur.

[3] After a full trial with witnesses, the High Court had allowed the plaintiff's claim. The plaintiff was the first purchaser of the said property. The fourth defendant, who was the second purchaser, has now filed this appeal against the decision of the High Court at Kuala Lumpur given on 23 October 2015.

[4] At the hearing of the appeal on 19 April 2016, and after having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our decision on a date to be informed. In the meantime, parties were to furnish the court with further research on the application of s. 340 of the National Land Code ("NLC"). Having been apprised of the position, this is now our unanimous decision.

[5] It is pertinent to note that only the fourth defendant now appeals to this court. For convenience, the parties will be referred to as they were in the High Court.

The Factual Background

[6] The relevant facts leading to the filing of the suit are well set out in the judgment of the High Court and can be summarised as follows. On 19 September 1989, the plaintiff purchased the property, a studio apartment at Menara Seputeh, from the developer Natarjaya Sdn Bhd ("Natarjaya") for a sum of RM57,540. Natarjaya is the first defendant. The second and third defendants are directors of Natarjaya.

[7] To finance this purchase, the plaintiff took a loan a loan from BBMB Kewangan Berhad. On 12 December 2007, the plaintiff entered into a deed of receipt and reassignment ("the R&R") with his financier CIMB Bank (the successor entity of BBMB Kewangan Bhd) given that the facility taken by the plaintiff to finance the purchase of the property was fully settled by him. Accordingly, the full purchase price was paid to the developer Natarjaya as found by the learned judge.

[8] The plaintiff had for many years resided in South Korea. He returned in 2012. On or about 8 March 2012, the plaintiff went to clean the said property. Upon arrival at the property, he discovered that the padlock and the wooden door had been changed without his knowledge. He then lodged a police report.

[9] Upon a search of the strata roll the plaintiff discovered that there had been an entry by a person named Chan Kwai Foong (fourth defendant) as the registered owner of the said property. The plaintiff was shocked as he had never consented to have the property transferred to anyone. He then lodged another police report. He also informed the land office and lodged a caveat on the property on 12 March 2012.

[10] It also turned out that the fourth defendant had executed a sale and purchase agreement with the first defendant (Natarjaya) on 8 September 2008. The title was registered in the fourth defendant's name on 19 December 2008. The fourth defendant had paid the full purchase price of RM45,000 to the first defendant. For this purchase, the fourth defendant was represented by the legal firm of Messrs SK Ling & Partners.

[11] It also transpired that when the plaintiff discovered this double sale, the fourth defendant was in the process of selling the property to the fifth defendant for a sum of RM95,000. A sum of RM45,000 had been paid and the balance was to be paid upon the removal of the plaintiff's caveat. It seemed that this sale was thwarted by the civil action filed by the plaintiff.

At The High Court

[12] The claim against Natarjaya and its directors (first to third defendants) was based on fraud. No appearance had been entered by them. Relying on the authority of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, the learned Judicial Commissioner ("JC") took the position, and correctly if we might add, that since no appearance had been entered, fraud had been proved against the first to third defendants and this finding would be binding on the other defendants in the action.

[13] At the end of the trial and after hearing submissions, the learned JC came to the following findings which appear in his judgment:

(a) Section 340 of the National land Code ("NLC") may be invoked not just by a former registered proprietor but also a beneficial owner based on the authority of *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224 and *Samuel Naik Siang Ting & Ors v. Public Bank Bhd* [2015] 6 CLJ 914 CA;

(b) The plaintiff has failed to prove that the fourth defendant was a party or privy to the fraud committed by the first to third defendants. Accordingly, the fourth defendant's title is not defeasible under s. 340(2)(a) of the NLC;

(c) Based on the authority of Ong Chat Pang, an immediate purchaser who was not implicated in any fraud can obtain an indefeasible title if he can show that he was a purchaser in good faith for valuable consideration within the meaning of the proviso to s. 340(3) of the NLC;

(d) On the facts, the fourth defendant was not able to satisfy the court that she was a purchaser in good faith and for valuable consideration. As a consequence, the title of the fourth defendant was defeasible at the instance of the plaintiff; and

(e) No case could be made against the fifth defendant as he was never registered as a proprietor of the said property. Accordingly, the plaintiff's claim against the fifth defendant was dismissed.

[14] As a consequence of these findings, judgment was entered as follows:

(a) In exercise of the powers under s. 417 of the NLC, the sixth defendant is directed to effect transfer of the said property to the plaintiff and to record the plaintiff as the registered proprietor;

(b) The first to third defendants are liable to the plaintiff for general and exemplary damages to be assessed by the Registrar of the court together with pre-judgment and post-judgment interest at a rate of 5% per annum;

(c) Each of the first to fourth defendants to pay costs of RM30,000 to the plaintiff; and

(d) No order as to costs in respect of the fifth and sixth defendants.

Our Decision

[15] The main issue before us was whether the learned JC was in error when he required the fourth defendant to prove that she was a *bona fide* purchaser for valuable consideration pursuant to s. 340(3) of the NLC. This issue arises as the fourth defendant contends that s. 340(3) applies only to subsequent purchasers whereas the fourth defendant, being an immediate purchaser, falls under s. 340(2) of the NLC.

[16] In this connection, much reliance was placed on the Federal Court decision in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 ("*Kamarulzaman*"), and in particular the following passage (at p. 1025):

> Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[17] It is interesting to note that *Kamarulzaman* was also a case of land fraud. There, it was found that the first to the fourth respondents had acquired the title to the property in question through fraud and misrepresentation. The said property was then transferred to the fifth and sixth respondents who claimed that they had acquired an indefeasible title as they were *bona fide* purchasers.

[18] Now it is significant that in *Kamarulzaman*, there appeared to be no discussion as to whether the fifth and sixth respondents were party or privy to the fraud, after having been determined to be the immediate purchasers. The proposition advanced by the Federal Court was that the shield of indefeasibility was not available to the immediate purchaser.

[19] The following is how the Federal Court dealt with this issue (at p. 1024):

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and/or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by the fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

[20] The learned JC in the instant case, however, relied on the well-known Federal Court case of *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224 ("*Ong Chat Pang*"), a case which has invited much debate concerning the extent of equitable intervention in the Torrens system.

[21] *Ong Chat Pang* was another case involving land fraud with somewhat similar facts as the instant case. In that case, the first and second defendants, the registered proprietors of the land in question, contracted to sell the said land to the plaintiff. The plaintiff later discovered that subsequent to his contract with the first and second defendants, the said land had been transferred by them to the third and fourth defendants. The plaintiff brought an action against all the defendants for specific performance of his contract and for an order that the registration in favour of the third and fourth defendants be cancelled and a transfer effected to himself. The High Court gave judgment for the plaintiff.

[22] In the Federal Court, both Suffian FJ and Gill FJ in separate judgments affirmed the decision of the High Court. The decision was based on s. 42 of the then FMS Land Code. This provision although worded

differently has the same legal effect as the present s. 340 of the NLC as was decided in *Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387; [1983] 1 MLJ 81.

[23] Interestingly in *Ong Chat Pang*, the third and fourth defendants had knowledge of the prior contract of sale but nevertheless proceeded to obtain registration of the said land for themselves and at the trial claimed indefeasibility of title. Although some adverse comments were made as to the unconscionable conduct of the third and fourth defendants, both Suffian FJ and Gill FJ affirmed the trial court's finding that there was no fraud on their part. The Federal Court, in the end, dismissed the appeal on the ground that the third and fourth defendants had failed to prove that they were *bona fide* purchasers for value.

[24] Coming back to the instant case, the learned JC similarly held that there was no independent evidence or objective facts in the case that could support the allegation of fraud except perhaps the fact that the purchase price was only RM45,000 when the initial purchase price paid by the plaintiff some 20 years ago was RM57,540. The fourth defendant had then purported to sell the said property to the fifth defendant for a sum of RM95,000. The learned JC nevertheless considered that this in itself was insufficient to discharge the burden of proof of fraud on a balance of probabilities based on the recent decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584. As the plaintiff did not challenge this finding on appeal, we have no reason to interfere with the learned JC's decision in this regard.

[25] Relying on the case of *Ong Chat Pang*, the learned JC went on to consider if the fourth defendant was a purchaser in good faith and for valuable consideration. In this regard, we have no quarrel with the finding of the learned JC that the fourth defendant was not such a *bona fide* purchaser as recognised by the law although we will come back to the question of whether this was the appropriate approach to be adopted.

[26] In any case, the learned JC was right to assert that the burden of proving such *bona fide* was on the fourth defendant who curiously did not testify in court but had given a power of attorney to DW2, through whom documentary evidence was tendered. The law in this regard, as was duly noted by the learned JC, was summarised in the case of *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107 as follows (at p. 121):

> Now who is a good faith purchaser or sometimes known as a *bona fide* purchaser has been considered in a number of cases. In *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167 the Court of Appeal held that the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into

A a transaction but the overriding consideration is the particular circumstances of each case (per Richard Malanjum JCA (as he then was) at p. 184).

In another Court of Appeal decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, Raus Shariff JCA (as he then was) in a
B separate but supporting judgment held that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. His Lordship took the view that a subsequent purchaser was "under an obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the vendor as correct and genuine." When the purchaser "failed to take the ordinary
C precautions which ought to be taken in such a matter he is not entitled to the protection of the court." (at p. 554)

It may therefore be surmised that in order to prove there was *bona fide* purchase what is required of the purchaser is to establish that there was an honest dealing or honest conduct in the acquisition of any title or
D interest in any property (see also *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224). In this regard, there is a duty to make the necessary enquiries regarding the dealing as the particular circumstances of the case demands so as to acquire knowledge of the improper conduct. Any person who in the circumstances ought to have made the necessary inquiries but fails to do so may be guilty of wilful
E blindness or voluntary ignorance such that it would amount to unfair conduct. Even carelessness or negligence in doing so would disentitle the subsequent purchaser to the title or interest of any such property. It cannot be gainsaid that the duty to do so cannot be a light one as otherwise gross injustice would befall the innocent owner of the land.

F **[27]** We note that in order to discharge this burden, the fourth defendant relied entirely on two documents. The first was a document from Natarjaya dated 10 September 2008 where Natarjaya confirmed that it was the registered owner of the property in question. The second was a copy of the strata title showing Natarjaya as the registered proprietor.

G **[28]** As against this was the evidence that was alluded to earlier in that the purchase price of RM45,000 paid by the fourth defendant was significantly lower than the price paid by the plaintiff some 20 years ago of RM57,450.00. This was also half of the selling price to the fifth defendant. The fourth defendant herself did not turn up to give evidence. In the end, no evidence
H was tendered to explain why the purchase price was significantly lower than the price paid by the plaintiff.

[29] As we had observed earlier, the absence of the fourth defendant at the trial was risky as the burden was on her to establish that she was a purchaser in good faith and for valuable consideration. The presence of her attorney,
I DW2, apart from tendering the documents as mentioned earlier, was on the whole useless. As DW2 candidly admitted, he did not have the requisite knowledge. As the said property was being offered for sale at a suspiciously low price, there was a duty on the part of the fourth defendant to make the

necessary enquiries and to investigate all matters relating to the sale. The surrounding facts and circumstances relating to the sale were peculiarly within the knowledge of the fourth defendant. It cannot be right that no consequences follow a defendant's failure to testify on matters within his or her knowledge. At least, a reasonable explanation must be provided if no such enquiries were made. Instead, the fourth defendant has chosen to provide no explanation. Given the facts and circumstances in the case, it would be fair to surmise that the failure of the fourth defendant to testify would not only discredit her case but strengthen the plaintiff's case (*Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381).

[30] The upshot is that the learned JC was more than entitled to come to a finding that the fourth defendant had failed to discharge the burden of showing that she was a purchaser in good faith and for valuable consideration. This burden, as alluded to earlier, is not a light one as the consequences are serious, including loss of ownership by a previous legitimate owner of the property, an owner who may have done nothing wrong to disentitle him or her to the property.

[31] Be that as it may, we have alluded to the findings of the learned JC on the question of whether the fourth defendant was a *bona fide* purchaser purely for the sake of completeness. We are constrained to hold that the learned JC need not have relied on the case of *Ong Chat Pang* as the law in this regard has since moved on and taken a different turn with the Federal Court cases of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 and *Kamarulzaman*, *supra* which appear to take the position that an immediate purchaser is not entitled to rely on any claim of being a purchaser in good faith and for valuable consideration.

[32] In its stead, the law now, as the learned JC himself duly noted, is that once the plaintiff had paid the purchase price, he became the beneficial owner of the property with the vendor holding the legal title to the property as a bare trustee for the plaintiff.

[33] That this in fact is the true legal position has been established in a long line of cases beginning with the oft-quoted case of *Lysaght v. Edwards* (1876) 2 Ch D 449 where Jessel MR observed (at p. 506):

> ... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

[34] This "bare trustee" principle, as we would call, was approved by the Federal Court in *Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45 where Ong Hock Sim FJ held (at p. 47):

> The law is clear that the vendors, after receipt of the purchase price and surrender of possession of the said land to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands that can be the subject matter of a caveat.

[35] This principle received further approval in two recent Federal Court cases - *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 ("*Samuel Naik*") and *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193. Of interest is the *Samuel Naik* case as the facts are relevant to the instant appeal. In speaking for the Federal Court, Ramly Ali FCJ held (in the headnotes):

> (3) It is settled law that after receipt of the full purchase price and the surrender of possession of the lands to the purchasers, the vendors of the land became bare trustees. It was thus clear that MPM, being the registered proprietor of the land after executing the SPAs with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property). In other words, MPM in the present case, was not permitted in law to sell or transfer the land to the new purchasers, including the appellant. Thus, the Court of Appeal was correct in its finding that the subsequent sale of the lots by MPM to the new purchasers (including the appellant) were void *ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements. (para 46-54)
>
> (4) The issue of indefeasibility of title and interest in alienated land is governed by s. 340 of the NLC. Under s. 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument. In the present case, the undisputed facts of the case clearly showed that the SPAs as well as the deeds of assignment with the earlier purchasers were valid and enforceable; and the subsequent SPAs with the new purchasers (including the appellant) were void *ab initio* and of no effect. It followed that their related transfer forms ('Forms 14A') should also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there was sufficient evidence to show that the said form 14A was in fact a void instrument. (para 61-70)

[36] The circumstances in which a purchaser of land may fail to obtain a good title was amply explained by Wan Yahya SCJ in the then Supreme Court case of *M & J Frozen Food Sdn Bhd & Anor v. Siland Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294 when in speaking for the court, His Lordship observed (at p. 23 (CLJ); p. 309 (MLJ):

> A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance

or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had - *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s. 340(3) of the NLC where a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility - see *Gibbs v. Messer*. Under this principle, the registration of the insufficient or void instrument can be set aside.

[37] Applying the principles as we have set out, it is plain that the developer Natarjaya, after receiving the purchase price and surrendering possession of the said property to the plaintiff, became a bare trustee for the plaintiff. Accordingly, Natarjaya had no legal capacity to enter into any agreement with the fourth defendant. The common law rule of *nemo dat quod non habet* comes leaping to mind. In short, Natarjaya could not give a better title than what it had. The *nemo dat* rule, however, is limited in its application by s. 340 of the NLC in that subsequent purchasers may still acquire an indefeasible title pursuant to s. 340(3) as long as they can show that the title or interest was acquired in good faith and for valuable consideration. In the present case, it was common ground that the fourth defendant was not a subsequent but an immediate purchaser.

[38] There was also some question of a lack of pleading in this regard. However, a perusal of the pleadings shows this issue was pleaded in para. 23 of the statement of claim as follows:

23. Plaintif menegaskan bahawa sebarang pindahmilik Hartanah tersebut adalah terbatal, tidak sah dan/atau tidak berkuatkuasa disisi undang-undang sejak dari mula memandangkan bahawa Defendan Pertama, tidak mempunyai sebarang hak untuk menjual Hartanah tersebut. Sebarang transaksi dan/atau pindahmilik Hartanah tersebut kepada Defendan Keempat dan/atau Defendan Kelima juga adalah tidak sempurna dan boleh disangkal ("defeasible").

[39] This issue was also raised in the evidence of the plaintiff as follows:

Q29. Adakah pindah milik Hartanah tersebut yang dilakukan daripada Defendan Pertama kepada Defendan Keempat sah?

A: Saya menegaskan bahawa sebarang pindahmilik Hartanah tersebut adalah terbatal, tidak sah/atau tidak berkuatkuasa disisi undang-undang sejak dari mula memandangkan bahawa Defendan Pertama tidak mempunyai sebarang hak untuk menjual Hartanah tersebut. Sebarang pindahmilik Hartanah tersebut kepada Defendan Keempat

A dan/atau Defendan Kelima juga adalah tidak sempurna dan boleh disangkal ("defeasible"). Defendan Keempat juga tidak pernah berhak melakukan pendaftaran strata Hartanah tersebut keatas namanya memandangkan bahawa sayalah yang merupakan tuanpunya Hartanah tersebut dan bukan Defendan Keempat.

B **[40]** As was indicated at the outset, the claim against Natarjaya was based on fraud as was the claim against the fourth defendant. Natarjaya and its directors (second and third defendants) did not file any appearance and failed to turn up in court. The learned JC was then entitled to rule, as he did, that based on the decision in *Kamarulzaman*, *supra*, the finding of fraud was taken
C to have been proved against the first, second and third defendants and this finding would also be binding on the other defendants in the action.

[41] With this finding, it further confirms the legal position that the purchaser fourth defendant could not have obtained good title from Natarjaya. The subsequent sale and purchase agreement entered into between
D Natarjaya and the fourth defendant was therefore void. It must also follow that all transactions relating to this sale including the documents or instruments used are similarly all void. The net effect is that the fourth defendant is disentitled to the property and the plaintiff must remain its rightful owner.

E **Conclusion**

[42] In the circumstances, and for the reasons we have stated which differ somewhat from those provided by the learned JC, we find no reason to interfere in the final decision of the High Court. The appeal is therefore dismissed with costs. The orders of the High Court are affirmed. We will
F now hear parties on the appropriate order as to costs.

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